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No. _____

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In The

Supreme Court of the United States

October Term, 1991

VINCENT DEGEROLAMO, GERALD DEGEROLAMO, RONNIE BRYSER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court permit the abandonment by lower courts of the well-established canons of statutory construction which have placed primary importance on the "plain meaning" of the words of a statute in favor of one that allows a court to attempt to carry out what it thinks are the unwritten, broad policy choices of Congress *implicit* in the statutory scheme?

2. Whether the term "goods or chattels," as used in 18 U.S.C. § 659, includes money?

3. In light of this Court's grant of certiorari in *Montana v. Imlay,* Dkt. No. 91-687, should certiorari be granted in this case (or the petition be held in abeyance pending the outcome of *Imlay*) because it raises a similar question: whether the Petitioners' privilege against self-incrimination was violated by the district court's upward departure from the Sentencing Guidelines because they refused to reveal the location or disposition of the fruits of the theft of which they were convicted, a revelation which could have exposed them to further prosecution?

4. Whether an upward departure was authorized where Petitioners failed to return the stolen money, even though the Sentencing Guidelines Commission, in formulating the Guidelines, had adequately considered the failure to return stolen property?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the court of appeals is not yet reported, but is reprinted in the appendix at App. 1. The district court did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1992. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 659 of Title 18 of the United States Code provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . storage facility . . . with intent to convert to his own use any goods or chattels moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property
>
> . . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both.

Section 3553(b) of Title 18 of the United States Code provides in pertinent part:

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Section 5E1.1 of the United States Sentencing Guidelines provides in pertinent part:

> (a) The court shall –
>
> (1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664;
>
> . . . .
>
> (c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court for the Southern District of New York of stealing over three million dollars in cash from an armored car company, as well as related charges of conspiracy, mail fraud and wire fraud. Petitioners were tried before a jury on an indictment charging them with the theft of "goods and chattels" from an interstate shipment in violation of 18 U.S.C. § 659.

The theory of the prosecution was that Petitioners conspired in the acquisition of two armored car companies which were consolidated into one, Hercules Securities Unlimited, for the purpose of stealing the monies entrusted to those firms by customers. According to the prosecution, Petitioners induced customers to deal with them by obtaining and using large theft insurance policies as comfort for the customers and by misrepresenting the identity, background and experience of Hercules' operators. To induce the insurance underwriters to issue

insurance policies, Petitioners allegedly made false statements about the operations of the company. The prosecution ultimately maintained that the Petitioners stole $3,744,567.58 in cash from the vault of Hercules.

The theory of the defense was that the former owner of one of the predecessor armored car companies, who continued to work for Petitioners after the sale, was responsible for the theft. There was testimony at trial that the former owner had the combination to the vault, as well as documented proof that he had used Vincent DeGerolamo's code number to gain entry to the vault. The defense also called several alibi witnesses who testified that Petitioners Gerald and Vincent DeGerolamo were at home at a particular time and thus could not have been on the premises of Hercules at the time the theft took place.

On January 28, 1991, the jury, after deliberating for approximately two days, found Petitioners guilty of all charges. On April 9, 1991 the District Judge departed upward from the Sentencing Guidelines and imposed prison sentences upon Ronnie Bryser, Gerald DeGerolamo and Vincent DeGerolamo of 10 years, 8 years and 6 and one-half years respectively because the funds that the judge "presumed" were available to Petitioners had not been returned nor had Petitioners revealed the location or disposition of the money. In addition, Petitioners were each fined $10,000, and a restitution order for the full $3,744,567.58 was entered against them.

On appeal, Petitioners argued that the indictment did not state a crime because 18 U.S.C. § 659 prohibits the theft of "goods or chattels," and money does not come

within the meaning of "goods or chattels." Petitioners contended that this conclusion was confirmed by the fact that when Congress intended to make "money" the subject of a theft, it expressly employed that term in other paragraphs in the very same statute.

In addition, Petitioners challenged whether a district judge is empowered to depart upwards from the Guidelines because the stolen money, which he "presumes" the defendants have, has not been returned. Petitioners argued that, since the Guidelines had contemplated the return of money by the mechanism of restitution and because the upward departure punished the defendants for their silence, it was unlawful.

The court of appeals rejected Petitioners' complaints and affirmed their convictions. It concluded that Congress intended to include "money" when it enacted § 659, despite the fact that the word "money" was never used by Congress in the applicable paragraph. On the matter of the sentence, the Second Circuit concluded that an upward departure was perfectly appropriate where defendants refused to return the proceeds of a larceny, but remanded the case for resentencing because the district court failed to make adequate findings to support an upward departure.[1]

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[1] Resentencing has been adjourned pending disposition of this petition.

REASONS FOR GRANTING THE PETITION

I

THE SECOND CIRCUIT'S DECISION ADVANCES AN ALARMING TREND IN FEDERAL COURTS TO LOOK TO THE "IDEA" OF A STATUTE RATHER THAN TO USE TRADITIONAL CANONS OF STATUTORY CONSTRUCTION TO DETERMINE A STATUTE'S MEANING; CERTIORARI SHOULD BE GRANTED TO ADDRESS THIS CHALLENGE TO THE SUPREME COURT'S JURISPRUDENCE OF STATUTORY CONSTRUCTION.

Why is this case so important? Because the Second Circuit's decision is representative of a most dangerous trend – one that is becoming all too common among circuit courts today – of abandoning traditional canons of statutory construction in favor of speculating what Congress intended by a criminal statute. This troubling practice calls for immediate corrective action. A stop must be put to this type of imaginative reconstruction of criminal statutes by federal courts.

In a deeply disturbing decision, the Second Circuit has taken § 659, dealing with the theft of "goods or chattels" from freight stations, and has audaciously concluded that Congress *meant* to include the term "money," even though there is not a trace of evidence that such intent was ever contemplated by Congress. And this was done by ignoring the "plain meaning" of the words of the statute. The omission of any mention of "money" in the first paragraph § 659 is powerful evidence that it addresses a distinct and separate category of criminal activity. If Congress had intended to include money when enacting § 659, it could have easily inserted that noun in

the first paragraph – *as it did in another paragraph of the very same section.* In the 78 years of the statute's existence, no other court has held that "money" comes within the reach of "goods or chattels" as used in the first paragraph of § 659.[2] The Second Circuit's prodigal interpretation of § 659 undermines decades of decisions by this Court regarding construction of criminal statutes and cannot be allowed to stand.

Congress' omission of "money" from the first paragraph of § 659 cannot be presumed to have been unintentional. This is not surprising because the legislative agenda of the opening paragraph of § 659 is the theft of freight. Petitioners' analysis is eminently reasonable. What is unreasonable is the notion that Congress, even while taking pains to list with specificity the particular types of things which are the subject of a theft, nevertheless intended that money was to be included as well. Moreover, even if Congress failed to include money either by mistake or oversight, it is not for our courts to amend or modify the statute by filling gaps in the legislation. If there is a gap in the law, it should be left to Congress to decide whether to enact legislation to fill it. *See McNally v. United States*, 483 U.S. 350, 360 (1987) (if Congress desires mail fraud statute to reach intangible rights, "it must speak more clearly than it has"); Pub.L.

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[2] In *United States v. Ingrao*, 844 F.2d 314 (6th Cir. 1988), where the defendant was charged under § 659 with stealing food stamps as well as money from an armored truck, the Sixth Circuit assumed *arguendo* that the statute did not apply to the theft of money, but held that in any event food stamps were "chattels," a point conceded by the defendant, and therefore his conviction under the statute was proper. *Id.* at 317.

100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508, 18 U.S.C. § 1346 (redefining scheme to defraud to include intangible right, in light of *McNally*).

The universal principle holding that crimes are solely creatures of statute and that the doctrine of lenity should be applied to the construction of criminal provisions needs no scholarly vindication. *See, e.g., Dowling v. United States*, 473 U.S. 207 (1985); *United States v. Bass*, 404 U.S. 336 (1971); *United States v. Busic*, 446 U.S. 398 (1980); *United States v. Emmons*, 410 U.S. 396, 411 (1973). Since legislative purpose is generally expressed "by the ordinary meaning of the words used," *Richards v. United States*, 369 U.S. 1, 9 (1962), it is a basic tenet of statutory construction that consideration must first be given to the language of the statute, not to legislative history.

Thus, when analyzing a statute like § 659, primary attention must be paid to its language in order to determine the scope of conduct the enactment forbids. Moreover, when the statute is penal in character, the words are not to be extended beyond their natural meaning or common use. Therefore, this case provides the Court with an opportunity to correct a growing practice that is in direct conflict with an unbroken line of cases decided by this Court holding that criminal statutes must be construed strictly and based upon the "plain meaning" of the language. *See, e.g., Dowling v. United States*, 473 U.S. at 228 ("the language of § 2314 does not 'plainly and unmistakably' cover petitioner Dowling's conduct") (citation omitted).

Here, the language of the statute is unambiguous. The pertinent portion of § 659 provides:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . storage facility . . . with intent to convert to his own use any *goods or chattels* moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property [is guilty of a crime]. (Emphasis supplied.)

Count Two of the indictment charged that on or about November 12, 1989:

> the defendants unlawfully . . . stole, . . . from a storage facility, to wit, the vault of Hercules Securities Unlimited Inc., with intent to convert to their own use, *goods and chattels* . . . which constituted an interstate shipment of freight, express and other property, *to wit, approximately, $2,127,589.* (Emphasis supplied.)

The $2,127,589 stolen from Hercules is neither "goods" nor "chattels" by any definition of those terms. Moreover, when Congress intended to include "money" as a subject of a theft in the very same statute, it specifically used the word "money." For instance, paragraph four of § 659 reads:

> Whoever embezzles, steals or unlawfully takes . . . from any railroad car [or other vehicle] . . . or from any passenger thereon any *money*, baggage, *goods, or chattels* [is guilty of a crime.] (Emphasis supplied.)

This Court has stressed that "where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United*

States, 464 U.S. 16, 23 (1983). In addition, it is well understood that words of common meaning used in statutes are to be applied literally. In this case, had Congress intended to include "money" in the first paragraph of § 659, it would have expressly done so – as it did in the fourth paragraph of the same section. The "plain meaning" of the words of § 659, combined with the legislative history, leads to the irresistible conclusion that "money" was never meant to be covered in the first paragraph.[3] In addition, the result we urge is further confirmed by the definition of "goods" contained in the Uniform Commercial Code, which specifically exempts "money."[4]

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[3] When § 659 of Title 18 was introduced into law, the following commentary confirms that the theft of "money" was never contemplated by Congress:

> An act to punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of *freight* and express *packages* or *baggage* or *articles* in the process of transportation and interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same.

(62d Congress, session III, Ch. 50, 1913; emphasis supplied.)

[4] Under the Uniform Commercial Code, Section 2-105(1), "goods" are defined as ". . . . all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale *other than money* in which the price is to be paid, investment securities and things in action." (Emphasis supplied.)

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Furthermore, there are many federal statutes dealing with thefts or robberies from interstate shipments, or the possession of stolen property from such shipments, that use the words "money" in addition to "goods" and/or "chattels."[5] Can there be any doubt that when Congress wanted to include "money" as the subject of a theft, it knew how to do so?

Surely the decision that most calls for a grant of certiorari in this case is *Rodriguez v. United States*, 480 U.S. 526 (1987), where the Second Circuit did almost the same thing as here and was corrected by this Court. In *Rodriguez* the Second Circuit had construed the language

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The term "chattel" means an article of personal property, and "chattel paper" means writings which evidence both a monetary obligation and a security interest in a lease or goods, but neither term includes "money." *See* Black's Law Dictionary (5th ed.).

[5] For instance, 18 U.S.C. § 2314 (interstate transportation of stolen goods) provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value $5000 or more, knowing the same to have been stolen . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Emphasis supplied.)

Some other federal statutes that use the term "money" as the subject of a theft, robbery or larceny are: § 641 (Theft of Public Money, Property or Records); § 663 (Solicitation or Use of Gifts); § 656 (Theft, Embezzlement or Misapplication by Bank Officer); § 660 (Carriers Funds Derived from Commerce); § 664 (Theft or Embezzlement from Employee Benefit Plan); § 665 (Theft or Embezzlement from Employment and Training Funds); and § 2315 (Receipt of Stolen Goods).

of 18 U.S.C. § 3147 in a way that it thought advanced the broad purposes of the law. This Court granted certiorari and summarily reversed, holding that statutory construction which relies on an understanding of the "broad purposes" of a statute is most impermissible, because "[n]o legislation pursues its purposes at all costs." *Id.* at 525-526. The Court, explaining that deciding what competing values will or will not be sacrificed to the achievement of a particular statute's objective is the very essence of legislative choice, emphasized that it is simply wrong for a court to "simplistically . . . assume that *whatever* furthers the statute's primary purpose must be the law." *Id.* at 526 (emphasis the Court's.) The Court added that "[w]here, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' " *Id.* at 526 (elision and brackets the Court's; citations omitted). The Court concluded that the Second Circuit's decision was "plainly inconsistent with important doctrines of statutory construction." *Id.*

Thus, contrary to the Second Circuit's similar approach in this case, the conspicuous omission of any reference to "money" in the language of § 659 and the plain language of the statute should be dispositive unless such an interpretation is refuted by a clear and particularized expression of legislative intent. The Second Circuit pointed to no such expression of legislative intent nor does any exist.

Indeed, a look at the legislative history of § 659 confirms that the first paragraph was never meant to

include money. The origin of § 659 lies in three earlier provisions (§§ 409, 410, 411 of Title 18) that were passed in 1913 under a surge of progressive legislation launched by the Wilson administration. This legislation was passed in the wake of a wave of thefts of *freight* from railroad cars, freight stations, depots and loading platforms, a specific problem that needed to be attended to by specific legislation.[6]

In contravention of the plain language of § 659 and notwithstanding its legislative history, the Second Circuit simply surmised that Congress must have intended to include "money" in first paragraph of that statute. The Second Circuit's supposition that when Congress added the fourth paragraph to § 659, which included the term "money," it did not reconsider the first paragraph, is not only conjectural, but wrong. Congress did consider the first paragraph of § 659 when the law was revised.

In 1932, when § 659 was amended to include the word "money" in the fourth paragraph of the law, the legislative history shows that careful consideration was given to the first paragraph as well. Under the heading "clarity," the legislative report shows that Congress not only expressly mentioned the first paragraph, but was preoccupied with theft of *articles* from railroad cars and the like.[7] Thus, it is clear that Congress certainly did

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[6] In 1940 §§ 409, 410, and 411 were consolidated and relocated under § 659.

[7] The legislative report reads as follows:

> In addition thereto, the pending bill clarifies and simplifies the language of this statute.

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consider the first paragraph at the time it added the fourth, and by not then inserting "money" in the first paragraph must be presumed to have omitted it intentionally because that paragraph addressed the theft of "goods or chattels" from freight cars, not money.[8]

Thus, consistent with the plain meaning of paragraph one of § 659, it is apparent from the legislative history that it was intended to apply to particular thefts of *things* from freight conveyances like railroad cars, steamboats, vessels, and from places where freight is stored like station houses, platforms, depots, and wharves – to protect "goods or chattels" that were kept in freight terminals, freight cars, storage facilities, pipelines and other such places. It is similarly apparent that the crimes Congress targeted under the first paragraph of § 659 did not

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* * *

> Paragraph one [the paragraph under which the Petitioners were charged here] may be called the burglary paragraph. The present law applies only to a "railroad car" makes it an offense to break the seal of such car, enter the same with intent therein to commit larceny. The pending measure makes it equally criminal to burglarize vessels, aircraft, motor trucks, wagons, or other vehicles, and the breaking of a "lock" as well as a seal is made equally offensive.

Senate Report No. 1632, 79th Cong., 2 Sess.

[8] Of course, even if Congress had not reconsidered the first paragraph in 1932, there would still be no basis for concluding that "goods or chattels" was intended to include money.

include the theft of money from facilities where currency is deposited by armored car companies.[9]

However, there is a disturbing movement gaining momentum in a number of circuit courts where a radically different approach has been taken toward the subject of statutory construction. The adherents of this movement, in construing statutes, have seen fit to speculate about the intent of Congress. *See* Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 Chi.L.Rev. 800, 805-17 (1983); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv.L.Rev. 892, 892-98 (1982). In effect, the views of Judge Posner and his school – which is not the law, *see generally McNally v. United States*, 483 U.S. at 373 (Stevens, J., dissenting) – were embraced by the Second Circuit in this case, leading to a result that it could not logically have reached had it followed the traditional statutory analysis mandated by this Court.

This Court has regularly reviewed cases where lower courts have strayed from the standards of construction established by this Court. Here, because the Second Circuit's holding was so patently unjustifiable under this Court's approach to statutory construction, certiorari should be granted.

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[9] It may well be that no federal statute proscribes such conduct. But this undesirable circumstance does not justify a *court* in proscribing it. Congress can easily pass the required legislation to remedy the omission.

II

PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED BY THE DISTRICT COURT'S UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES BECAUSE PETITIONERS REFUSED TO REVEAL THE LOCATION OR DISPOSITION OF THE MONEY TAKEN IN THE THEFT.

Another grave question presented by this Petition, closely related to the issue in *Montana v. Imlay,* Dkt. No. 91-687, *cert. granted* March 1, 1992, implicates the constitutional privilege against self-incrimination:

> Can a judge, consistent with the restraints of the Fifth Amendment, penalize Petitioners by an upward departure from the Sentencing Guidelines for their refusal of his demand that they reveal the location or disposition of the proceeds of the theft?

What ignited this controversy was the District Judge's statement prior to sentencing that if the stolen money was not returned, he would depart upwards from the Sentencing Guidelines. The Petitioners did not return the money and the Judge followed through on his threat, departing upward five levels![10] In doing so, the judge

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[10] The offense level for the crimes for which the Petitioners were convicted (including the enhancement for the amount of money allegedly stolen) was 21 for Vincent DeGerolamo and 23 for Gerald DeGerolamo and 25 for Ronnie Bryser. Two points of enhancement were added to each Petitioner because the District Judge determined that the offense involved more than minimal planning. Gerald DeGerolamo's and Ronnie Bryser's offense level was increased by another

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"presumed" the unreturned stolen funds were available to Petitioners.

The judge's unwarranted action was in contravention of the privilege against self-incrimination guaranteed by the United States Constitution. The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973).

Simply put, the Fifth Amendment requires that unless an individual is given immunity, he may not be confronted with the dilemma of either answering questions that may tend to incriminate him or suffering a penalty for his silence. Here, Petitioners were not offered any form of immunity. Obviously, to disclose the location or disposition of the money would require them to

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two points because the court determined that they acted as supervisors. Two additional points were added to Ronnie Bryser's offense level for obstruction of justice. Without the upward departure, this would translate into prison sentences of 37 to 46 months for Vincent DeGerolamo; 46 to 57 months for Gerald DeGerolamo; and 57 to 71 months for Ronnie Bryser.

Departing upwards, the judge imposed a prison sentence of 78 months on Vincent DeGerolamo; 97 months on Gerald DeGerolamo; and 120 months on Ronnie Bryser. Petitioners were also fined $10,000 each, and an order of restitution for $3,744,567.58 was entered against all three.

incriminate themselves with respect to other crimes for which they could be prosecuted, such as money laundering, "structuring," false statements (i.e., previous denials), obstruction of justice, interstate transportation of stolen property and more. The Second Circuit's low regard for these constitutional concerns, on the theory that Petitioners had already been convicted and thus could no longer incriminate themselves, is most unsettling.

Over the years our courts have been sensitive to sentencing actions that impinge on a persons Fifth Amendment privilege. For instance, in *Poteet v. Fauver,* 517 F.2d 393 (3d Cir. 1975), the trial court imposed a harsher sentence upon a defendant *after* a jury found him guilty because he refused to waive his Fifth Amendment right to maintain his innocence. In setting aside the sentence, the Third Circuit concluded that enhancement of a sentence, based upon a refusal to admit guilt, violated the due process clause of the Fourteenth Amendment. *See also United States v. Acosta,* 509 F.2d 539 (5th Cir. 1975); *Thomas v. United States,* 368 F.2d 941 (5th Cir. 1966).[11] But other courts, like the Second Circuit, have become unsympathetic to infringements on this ancient constitutional protection. *See Gollaher v. United States,* 419 F.2d 520 (9th Cir. 1969); *United States v. Hull,* 792 F.2d 941 (9th Cir. 1986). This division between the circuit courts of appeals calls

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[11] *Thomas* involved the allocution stage of sentencing in which a defendant may make a statement on his own behalf. The court in *Thomas* held that a sentencing court violates a defendant's privilege against self-incrimination by "augmenting" his sentence if he fails to accept responsibility for the crime.

for this Court to intervene and settle the dispute so that there will be certainty regarding a defendant's rights after conviction. Since the issue presented by this case is closely allied to that in *Montana v. Imlay,* certiorari should be granted or this petition should be held in abeyance pending the decision in *Imlay.*

III

AN UPWARD DEPARTURE OF FIVE LEVELS WAS UNAUTHORIZED WHERE PETITIONERS REFUSED OR WERE UNABLE TO RETURN THE STOLEN MONEY, SINCE THE SENTENCING COMMISSION, IN FORMULATING THE GUIDELINES, HAD ALREADY CONSIDERED THE FAILURE TO RETURN STOLEN PROPERTY.

The enhancement of the sentence in this case was also unauthorized because the Sentencing Commission considered a defendant's failure to return stolen property when formulating the Guidelines. Although a district judge has some discretion in departing from the Guidelines, any departure must be based upon a permissible ground, that is, "to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines." *See* 18 U.S.C. § 3553(b); U.S.S.G. 5K2.0.[12] Congressional "attempts to impose uniformity

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[12] U.S.S.G. 5K2.0 provides in pertinent part:

> Under 18 U.S.C. § 3553 (b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken

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will be destroyed if courts depart often from the Guidelines."[13] *United States v. Uca*, 867 F.2d 783, 786 (3rd Cir. 1989).

The commentary to Guidelines § 3E1.1, dealing with acceptance of responsibility, states:

> In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:
>
> . . . .
>
> (b) voluntary payment of restitution prior to adjudication of guilt;
>
> . . . .
>
> (e) voluntary assistance to the authority in the recovery of the fruits and instrumentalities of the offense. . . .

It could therefore not be more clear that the Guidelines have "adequately taken into account" the matter of voluntary assistance in the return of the fruits or instrumentalities of the crime. If a defendant returns stolen property prior to sentencing, he may receive credit for acceptance of responsibility; if he doesn't, he may not receive such credit. Thus, because the Commission took

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(Continued from previous page)

into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed."

[13] The Sentencing Guidelines themselves, at Section 1A4(b), expressly anticipate that departures will occur only in the most unusual case. Adherence to this principle is essential if the Sentencing Guidelines are to work as intended.

the matter of return of property into consideration when fixing punishment under the Guidelines, there is no proper basis for a court to depart from the guidelines when a defendant does not return the property.

The return of stolen property has been contemplated by the Guidelines not only by the acceptance of responsibility provisions, but also by the restitution provisions.[14] The means "considered" by the Commission to restore stolen property and deny a defendant the fruits of his crime is an order of restitution, ultimately enforceable as a judgment. Nothing could be clearer.[15] Here, where the sentencing judge ordered Petitioners to make restitution of $3,744,567.58, he was not authorized at the same

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[14] The Guidelines address restitution in Section 5E1.1, which provides in pertinent part:

> (a) The court shall –
>
> (1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664;
>
> . . . .
>
> (c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

[15] It would be unreasonable to conclude that the Sentencing Commission did not consider the return of money in a larceny case under the sections providing for restitution. Restitution of stolen property is a traditional remedy in criminal cases, both prior to and following enactment of the Guidelines. *See, e.g. United States v. Coe,* 891 F.2d 405, 408 (2d Cir. 1989) (district court ordered defendant to make restitution of $6,708 to bank he robbed).

time to depart upward from the Guidelines for Petitioners' failure to return the stolen money.

The way in which a criminal defendant cooperates with law enforcement is a factor which has received considerable attention in the Guidelines. A person who helps law enforcement and provides "substantial assistance" can obtain an unlimited downward departure under Guideline § 5K1.1. On the other hand, the Sentencing Commission has considered the individual who refuses to cooperate and concluded that this choice should not create a penalty. *See* Guideline § 5K1.2.[16] Today, when the Sentencing Guidelines are controlling, it is imperative that their stability be maintained. If a judge, despite the carefully wrought mechanisms of the Guidelines, can in addition to ordering restitution arbitrarily add five levels to a defendant's sentence because he did not return the proceeds of a theft, this will do violence to the whole philosophy of the Guidelines, uniformity and consistency in sentencing.

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[16] A person who chooses not to cooperate, such as Petitioners, remaining silent about the money, forfeits all the benefits of 5K1.2 as well as the advantages of a two point downward departure for acceptance of responsibility pursuant to Guideline § 3E1.1. Both under the Guidelines and as a constitutional imperative, although a defendant may obtain certain rewards for cooperating, he can not be punished for refusing to cooperate. *See United States v. Stratton,* 820 F.2d 562 (2d Cir. 1987). Other coercive procedures are available to a prosecutor to locate stolen property, such as compelling a convicted defendant's testimony before a grand jury. *See United States v. Schwimmer,* 882 F.2d 22 (2d Cir. 1989).

CONCLUSION

The petition for certiorari should be granted.

Dated: New York, New York
March 17, 1992

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 89, 90, 266—August Term, 1991

(Argued August 26, 1991 Decided January 14, 1992)

Docket Nos. 91-1220, -1221, -1336

UNITED STATES OF AMERICA,

Appellee,

—v.—

RONNIE BRYSER, GERALD DEGEROLAMO, VINCENT DEGEROLAMO,

Defendants-Appellants.

Before:

OAKES, *Chief Judge*,
FEINBERG and CARDAMONE, *Circuit Judges*.

Defendants Vincent and Gerald DeGerolamo appeal from judgments of conviction and sentences entered pursuant thereto following a jury trial in the United States District Court for the Southern District of New York, Vin-

cent L. Broderick, *Judge*, for violations of 18 U.S.C. §§ 371 (conspiracy), 659 (theft from an interstate shipment), 1341 (mail fraud), 1343 (wire fraud), and § 2 (accomplice liability for substantive offense) stemming from the theft of $3,744,567.58 from an armored car company they owned and operated with defendant Ronnie Bryser. Bryser was convicted of the same offenses but only appeals his sentence.

Convictions affirmed. Sentences vacated and remanded.

HERALD PRICE FAHRINGER, New York, NY (Diarmuid White, Lipsitz, Green, Fahringer, Roll, Schuller & James, of counsel), *for Defendants-Appellants Gerald DeGerolamo and Vincent DeGerolamo.*

(Louis E. Fasulo, Brooklyn, NY, *for Defendant-Appellant Bryser.)*

ANTHONY SIANO, Assistant United States Attorney, White Plains, NY (Otto G. Obermaier, United States Attorney, James B. Comey, New York, NY, of counsel), *for Appellee.*

OAKES, *Chief Judge*:

Defendants Ronnie Bryser, Vincent DeGerolamo, and Gerald DeGerolamo appeal from judgments of conviction entered on April 12, 1991 in the United States District

Court for the Southern District of New York, Vincent L. Broderick, *Judge*, for conspiracy, 18 U.S.C. § 371 (1988), theft from an interstate shipment, 18 U.S.C. §659 (1988), mail fraud, 18 U.S.C. § 1341 (1988), and wire fraud, 18 U.S.C. § 1343 (1988), following a nine-day jury trial.

Ronnie Bryser was sentenced to 120 months of imprisonment, Gerald DeGerolamo to 97 months, and Vincent DeGerolamo to 78 months. In addition, each defendant was sentenced to a three-year term of supervised release, a $10,000 fine, restitution of $3,744,567.58, and special assessments totalling $850.

On appeal, defendants Gerald and Vincent DeGerolamo contend (1) that their convictions for violations of 18 U.S.C. § 659 cannot stand because their indictment failed to state a crime, (2) that the district court committed reversible error in failing to grant their request for a jury instruction concerning their alibi defense, and (3) that there was insufficient evidence to support their convictions for mail fraud, wire fraud, and conspiracy. All three defendants further contend that the district court erred by departing upwards five levels from the sentencing range provided by the Sentencing Guidelines for failure to return the stolen money.

For the reasons below, we affirm the convictions but vacate the sentences imposed and remand for resentencing before Judge Broderick.

I. *BACKGROUND*

The seventeen-count indictment in this case arises from the defendants' November 12, 1989 theft of $3,744,567.58 in cash from the vault of Hercules Secu-

rities Unlimited, Inc. ("Hercules"), an armored car company they owned and operated.[1]

At trial, the government offered the following version of events. From July to November 1989, Ronnie Bryser, Vincent DeGerolamo, and Gerald DeGerolamo acquired two armored car companies for the purpose of stealing the monies entrusted to those firms by customers. In the summer of 1989, Bryser and Gerald DeGerolamo, with no prior experience in the armored car business, negotiated the first of these purchases, that of Titan Security Systems and Titan Courier Services (later renamed Hercules) in West Nyack, New York from James Peloso for $600,000. On the day of the closing, Gerald DeGerolamo provided Bryser with the down payment of $100,000 to pay Peloso in a plastic bag filled with bundles of cash wrapped in rubber bands. Peloso stayed on at Hercules, at Bryser's request, to teach him to operate the company and to introduce him to Titan's customers. Gerald DeGerolamo also provided cash each month to cover operating expenses.

Once in charge, Bryser had the door locks and the vault combination of the West Nyack facility changed and replaced the padlocks for the gates in the fence around the premises. At Gerald DeGerolamo's direction, Bryser gave the vault combination and new keys to Vincent DeGerolamo, who was subsequently seen opening locks, operating the alarm system, and opening the vault door.

In October 1989, Bryser reprogrammed the two Wells Fargo alarm systems covering the perimeter of the facility and the vault. Under the new program, Bryser was the "master" for the system, giving him the ability to program the alarm computer to accept other users. Bryser pro-

1 The three defendants were charged with one count of conspiracy, one count of theft from an interstate shipment, seven counts of mail fraud, and eight counts of wire fraud.

grammed the computer to accept Vincent DeGerolamo and James Peloso. Bryser also had one of his employees teach Vincent DeGerolamo to operate the alarm system and the vault combination system.

During the summer and fall of 1989, Bryser and Gerald DeGerolamo also acquired Armored Car Company of East Orange, New Jersey (East Orange) for $600,000. As part of the transaction, East Orange's owner insisted that the company's customers be sent certificates of insurance. Bryser sent the certificates out by mail and by facsimile wire transmission.

The defendants induced customers to deal with them by obtaining and using large theft insurance policies and by misrepresenting the identity, background, and experience of Hercules operators. For example, Bryser met with representatives from The Great Atlantic & Pacific Tea Company (A & P), one of East Orange's largest accounts. Bryser falsely represented that he had no partners and that he had wide experience in the business, thereby enabling him to retain A & P as a client and gain access to the cash receipts of 86 A & P stores.

To induce the insurance underwriters to issue the insurance policies, the defendants likewise made false statements about the operations of the companies. For example, in October 1989, Bryser falsely represented to his insurance agent, when asking for an additional $6 million of all-risk, transit insurance, that he was not going to hold large sums of cash at the West Nyack facility and that the amount of cash would stay well below the $1 million limit of the primary policy. Bryser indicated that the increased insurance coverage was only for marketing purposes.

In early November 1989, Hercules began experiencing financial pressures. A large client cancelled its account, the insurance company asked for an $8,350 premium payment for the all-risk transit insurance, and Peloso demanded payment of the unpaid balance from the Titan closing.

That same month, Bryser received a call from a loss control specialist working for the insurance underwriters requesting an examination of Bryser's operations. The visit was provoked by growing suspicions about Hercules. Soon thereafter, the defendants began their effort to steal customers' money from the Hercules vault.

On November 10, 11, and 12, 1989, Bryser caused vast sums of money to be loaded into the Hercules vault. Bryser ordered his drivers to take all the cash from East Orange to the Hercules vault in West Nyack for storage over the weekend, which amounted to more than $2.1 million. In addition, Hercules did not send all its trucks to make pickups from a toy store client, making it impossible to get almost $1.1 million of the client's cash to a bank that weekend. Instead, the money was taken to the Hercules vault. In total, over $3.7 million was loaded into the vault that weekend.

On Saturday morning, November 11, Gerald and Vincent DeGerolamo reprogrammed the alarm system so they would be able to arm and disarm the alarm system under Peloso's name. Later that afternoon, Gerald DeGerolamo asked Peloso what type of loss would involve the FBI in an investigation. Peloso told him that the loss of federal money sealed in blue plastic Federal Reserve bank trays would bring the FBI into a loss investigation.

That evening and the following night, November 12, Gerald and Vincent DeGerolamo participated in and

supervised the loading of the money into the Hercules vault. Shortly after 6:00 p.m. on Sunday evening, after the vault was fully loaded, the alarm system was armed, and all employees had left the Hercules facility, the alarm computer system recorded that the alarm systems for the premises and the vault were turned off. Less than an hour later, the systems were rearmed. The computer recorded that all actions were taken by "man number 10"—the number which was originally assigned to Peloso by Ronnie Bryser.

On Monday, November 13, after all attempts to open the vault using the combination failed, a representative of the vault installer began drilling through the vault wall. On the following day, when the drilling was complete, Hercules employees entered the vault and discovered that all but $190,000 of the cash stored over the weekend was missing. The cash that remained was sealed in the blue plastic Federal Reserve trays.

The defendants attempted to blame the former owner and operator of the business, Peloso, for the theft based on the fact that Peloso had an alarm access code and vault combination. To corroborate that theory, the defense also called a number of witnesses who testified that the DeGerolamos were in Rockaway at 7:35 p.m. on the night of the theft, approximately one half-hour after the robbery occurred. There was additional testimony that the drive from West Nyack to Rockaway takes at least one hour. Based on these facts, the defense argued that Vincent and Gerald DeGerolamo could not have carried out the theft.

The trial, which began on January 14, 1991, ended on January 28, 1991 when the jury found the defendants guilty on all counts. On April 12, 1991, Judge Broderick

imposed sentences on the three defendants, who subsequently filed notices of appeal.

II. *THE SUFFICIENCY OF THE INDICTMENT*

A.

At the outset, appellants Vincent and Gerald DeGerolamo contend that their convictions on Count Two of the indictment, charging that the defendants stole $2.1 million of funds entrusted to East Orange by its customers from the Hercules vault in violation of 18 U.S.C. § 659 (1988), cannot stand because cash is not "goods" or "chattels" within the meaning of the statute.

The first paragraph of 18 U.S.C. § 659 provides in pertinent part:

> Whoever . . . steals, or unlawfully takes, . . . from any tank or storage facility, station, station house, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate shipment of freight, express, or other property [is guilty of a crime]. (emphasis added)

Appellants argue that Congress specifically excluded theft of money from this paragraph of 18 U.S.C. § 659 covering theft from interstate shipments because in a later paragraph, covering thefts from common carriers, Congress criminalized embezzling, stealing or taking of "*money*, baggage, goods, or chattels." 18 U.S.C. § 659 (1988) (emphasis added).[2] Appellants contend that, as a

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2 The full text of 18 U.S.C. § 659's fourth paragraph provides:

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steam-

matter of pure statutory construction, if Congress intended to cover theft of money in the first paragraph of the statute, the statute would include the word, as it does in the fourth paragraph. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This argument would be more persuasive if the first and fourth paragraph were enacted by the same Congress, but the fourth paragraph was added as an amendment in 1933 to the original text of the statute enacted in 1913. *See* Ch. 50, §§ 1, 2, 37 Stat. 670 (1913) (original text); Ch. 16, 47 Stat. 773-74 (1933) (amendment adding fourth paragraph). The legislative history of the 1933 amendment reveals that Congress did not rethink the language of the first paragraph when it wrote the fourth into the statute. Therefore, we believe that appellants cannot maintain their argument that Congress' failure to fix the first paragraph in 1933 to conform to the fourth represents a deliberate policy choice.

The 1933 amendment originated in the Senate as an effort to fill a gap in the coverage of then-existing state criminal laws which prevented prosecution of passenger train robbers and con artists because it was "impossible to determine in which State the offense was committed." 75 *Cong. Rec.* 13,821 (1932). The Senate never considered the language of the first paragraph during its deliberations

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boat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever, buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen [is guilty of a crime].

on the bill; instead, it focused only on drafting problems internal to the 1933 amendment itself. *See id.* at 13,821-23.

After Senate passage on June 24, 1932, the bill was sent to the House of Representatives and referred to the House Judiciary Committee. The Committee reported the bill out favorably and in so doing gave the same gap-filling rationale for the amendment. The House report gives no indication that the first paragraph's language was reconsidered during the Committee's deliberations. *See* H.R. Rep. No. 1791, 72d Cong., 2d Sess. 1-2 (1932).

The bill first reached the House floor on December 19, 1932 but was set aside because of one Representative's concerns over the lack of a constitutional basis for the measure. The debate focused exclusively on this objection. *See* 76 Cong. Rec. 710 (1932). On January 16, 1933, the House recalled and ratified the amendment. The floor debate reiterated the amendment's previously expressed purpose and addressed some drafting problems particular to the amendment. Again, there is no evidence from the floor debate that Congress gave any consideration to the language in the first paragraph. *See* 76 Cong. Rec. 1897-99 (1933).

The legislative history of the 1933 amendment, therefore, fails to support appellants' argument that Congress reconsidered the first paragraph of § 659 after its original adoption in 1913. We simply have no basis for inferring that Congress deliberately excluded theft of money from the paragraph covering thefts from interstate shipments. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Appellants also argue that Congress reconsidered and preserved the original language of the first paragraph when the statute was later amended in 1946. *See* Act of July 24, 1946, ch. 606, 60 Stat. 656 (1946). We have long held, however, that the 1946 amendment made no "meaningful change . . . which would alter the essential object of the statute or require any different construction than we have given it." *United States v. Padilla*, 374 F.2d 782, 785 (2d Cir. 1967); *see also* S. Rep. No. 1632, 79th Cong., 2d Sess. 1-2 (1946) (explaining that the pending bill merely "clarifies and simplifies" existing language).[3]

We think appellants were properly charged under 18 U.S.C. § 659 for stealing millions in cash from the vault of an armored car business. This court has long interpreted § 659 as evincing Congress' intention to protect the integrity of interstate commerce and to prevent interference with the flow of that commerce. As we have previously explained:

> [18 U.S.C. § 659] does much more than extend the crime of larceny to interstate or foreign shipments. . . .
>
> The essential object of this statute is to create, define, and punish the offense of abstracting or unlawfully having in possession goods while in interstate or foreign transit, and thereby interfering with interstate or foreign commerce.

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3 Appellants also argue that use of the word "money" along with "goods" or "chattels" in other federal criminal statutes proves that Congress deliberately excluded the theft of money from interstate shipments from 18 U.S.C. § 659's coverage. *See, e.g.* 18 U.S.C. § 2314 (1988) (transportation of stolen goods). The 1913 Congress did not enact any of the statutes cited by appellants. Accordingly, we do not think these other enactments shed much light on the meaning of the 1913 statute.

White v. United States, 273 F. 517, 518 (2d Cir. 1921); *see also United States v. Marrale*, 695 F.2d 658, 663-64 (2d Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983).

In view of the purpose of the statute, we believe in this instance that the phrase "goods or chattels" includes money.[4] Here, the money was stored in large bundles and was not serving its usual function as a medium for exchange. As such, the money stolen by the appellants was indistinguishable from other kinds of property commonly stored for property owners.

Furthermore, if currency stored in bulk were exempted from the statute's coverage, businesses transporting money in bulk as a commodity, such as armored car businesses, would be deprived of the statute's protection. This result would create significant disincentives for engaging in the business of transporting cash. Insurers might not want to insure such businesses against theft and owners might no longer wish to continue transporting money across state lines if theft of that money is no longer a federal crime.[5] Interstate commerce would clearly suffer in the absence of money transportation businesses. Such disruptions of interstate commerce are precisely what Congress sought to avoid in enacting the statute.

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4 We have implied such a conclusion in prior cases where we affirmed convictions under 18 U.S.C. § 659, on other grounds, that were predicated on the inclusion of money within § 659. *See Marrale, supra; United States v. Werner*, 620 F.2d 922 (2d Cir. 1980).

5 The Government points out that no other federal criminal statute covers money stolen from interstate commerce. "As with other goods, money taken from an interstate shipment only falls within the reach of other stolen property statutes if it is transported across state lines *after* being stolen." *See also* 18 U.S.C. § 2314, 2315 (1988).

For these reasons, we hold that the phrase "goods or chattels" in the first paragraph of 18 U.S.C. § 659 covers the theft of cash from interstate shipments.[6]

B.

Appellants Vincent and Gerald DeGerolamo next argue that their indictment failed to state a crime because the Hercules vault is not a "storage facility" within the meaning of 18 U.S.C. § 659. They contend that only a "storage facility" which is used in conjunction with a "station, station house, platform or depot"—the facilities that directly follow the phrase in the statute—are contemplated as within § 659's coverage. *See United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956). Because the Hercules vault was not associated with any "station, station house, platform or depot," they argue, § 659 does not cover the vault.

We have long disagreed with crabbed interpretations of this statute. *See United States v. Wora*, 246 F.2d 283, 286 (2d Cir. 1957). When interpreting § 659, "we must . . .

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6 The only federal appeals court faced with a similar issue did not reach directly the issue whether money is covered by the phrase "goods or chattels." *United States v. Ingrao*, 844 F.2d 314, 316-17 (6th Cir. 1988). The Sixth Circuit instead noted that it had affirmed earlier convictions under § 659 for theft of money but assumed for the sake of argument that § 659 did not cover money. The court did, however, conclude that theft of food stamps would be covered. In language helpful for analyzing the issue at hand, Judge Guy reasoned that Congress used broad language in § 659 "to protect the free movement of goods in interstate commerce without reliance on narrow common law definitions." *Id.* at 317 *(quoting United States v. Shackelford*, 777 F.2d 1141 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986)). He concluded: "Under defendant's analysis, the items of most obvious value and, thus, most likely to be the target of theft from an interstate shipment would be removed from the purview of the statute. Congress surely did not intend such a result." *Id.* (footnote omitted).

be mindful that Congress has here undertaken to protect and promote the flow of goods in interstate commerce, and that this undertaking is not to be hampered by technical legal conceptions." *United States v. Berger*, 338 F.2d 485, 487 (2d Cir. 1964), *cert. denied*, 380 U.S. 923 (1965).

Moreover, we do not think that coverage of the Hercules vault in any way strains the plain language of the statute. Section 659 protects four broad elements of interstate shipment from theft: (1) means of surface transportation ("any pipeline system, railroad car, wagon, motortruck, or other vehicle"; (2) support facilities for surface transportation ("any tank or storage facility, station, station house, platform or depot"); (3) means of interstate shipment over water and support facilities ("any steamboat, vessel, or wharf"); and (4) means of interstate air shipment and support facilities ("any aircraft, air terminal, airport, aircraft terminal or air navigation facility."). Viewed in this light, the Hercules vault falls easily within the second category because the vault is a support facility for shipment by "wagon, motortruck, or other vehicle"—here, armored cars transporting currency. *See Padilla*, 374 F.2d at 786 (explaining that Congress amended the statute in 1925 "so as to add motor vehicles and their transfer and storage facilities to the interstate transportation facilities enumerated from which the proscribed thefts or takings must occur.").

Accordingly, we believe Count Two of the indictment alleging that defendants "stole . . . from a storage facility, to wit, the vault of Hercules Securities Unlimited, Inc. . . . approximately . . . ($2,127,589.00) in United States currency" sufficiently states the crime of theft from an interstate shipment in 18 U.S.C. § 659.

C.

Appellants next argue that the alleged original errors in the indictment were compounded when the district court constructively amended the indictment during the jury charge. Specifically, they contend that by substituting the term "property" in place of "goods or chattels" during the charge to the jury, the district court broadened the possible bases for conviction from those contained in the indictment.

The Fifth Amendment prohibits the trial of a "defendant . . . on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). A constructive amendment of an indictment occurs when "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)). Constructive amendments to an indictment are generally considered prejudicial *per se*, thereby requiring a new trial. *United States v. Weiss*, 752 F.2d 777, 787 (2d Cir.), *cert. denied*, 474 U.S. 944 (1985).

We do not believe that the jury charge, when viewed in its entirety, modified the essential elements of a § 659 offense such that the appellants may have been convicted of a different offense than that charged in the indictment. *See United States v. Clark*, 765 F.2d 297, 303 (2d Cir. 1985); *see also United States v. Colasurdo*, 453 F.2d 585, 590-91 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). When explaining the elements of the offense, the district

court indicated that the government must establish beyond a reasonable doubt that "property was taken" rather than using the precise phrase "goods or chattels." However, immediately preceding that explanation, the district court summarized Count Two of the indictment and used the words "goods and chattels" instead of "property" when explaining the charge against the defendants.[7]

Even if Judge Broderick had only explained to the jury that the theft of "property" was required for the offense, we fail to see how there was a substantial likelihood that the defendants could have been convicted of an offense other than 18 U.S.C. § 659. The jury heard no evidence regarding "property" stolen that was *not* part of an interstate shipment upon which they might have improperly based a conviction. To the contrary, the jury was only presented with evidence of the $3.74 million stolen from the Hercules vault on this charge. Accordingly, even if the district court's charge was slightly overbroad, there was no evidence presented of other "property" stolen upon which the jury could base a conviction for an offense that was not part of the grand jury indictment.

III. *FAILURE TO GRANT AN ALIBI JURY INSTRUCTION*

At trial, the defense called several witnesses who testified that Vincent and Gerald DeGerolamo were in Rockaway at about 7:40 p.m. on the night of the Hercules theft,

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7 The following is Judge Broderick's complete summary of Count Two in his instruction to the jury: "On November 12 in the Southern District of New York the defendants unlawfully, willfully and knowingly, stowed, carried away, concealed and by fraud and deception obtained from a storage facility, the vault of Hercules, with intent to convert to their own use goods and chattels which were a part of and constituted an interstate shipment of freight, to wit, approximately $2,127,589."

which occurred sometime between 6:11 p.m. and 7:02 p.m. There was further testimony establishing that it took at least one hour and nine minutes to drive from the West Nyack facility to Rockaway. After the district court called counsel to the side bar at the close of his charge, defense counsel requested for the first time that the court deliver an "alibi instruction" informing the jury that the government must disprove an alibi beyond a reasonable doubt.[8] The Government opposed the request and the district court decided not to deliver the supplemental charge on alibi. Appellants Vincent and Gerald DeGerolamo now contend that the district court's failure to so instruct was reversible error.

A defendant is entitled, upon proper request, to an instruction submitting to the jury any defense theory for which there is a foundation in the evidence. *See United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir. 1984). We have previously stated that, "[a]s a general rule, we think it best for [alibi] instructions to be given where alibi is claimed." *United States v. Burse*, 531 F.2d 1151, 1153 (2d Cir. 1976). A proper alibi instruction informs the jury that, in order to gain an acquittal, the defendant need not *prove* an alibi defense but need only raise a reasonable doubt as to his or her presence at the scene of the crime. *Id.* The instruction prevents the jury from concluding that the failure to prove an alibi defense is a sign of the defendant's guilt. *Id.*

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8 The instruction requested by the defense is revealed in the following colloquy:

> The Court: So tell me what you want me to charge the jury.
>
> Defense Counsel: That the defendants have offered witnesses who state that they were not at the scene at the time the crime was committed. I believe it is the Government's duty, along with everything else to disprove an alibi beyond a reasonable doubt.

In this case, however, we agree with the government's contention that there was no basis for an alibi instruction because an alibi covering the time of the theft is no defense to crucial charges in the indictment. Specifically, the government did not have to prove that Vincent and Gerald DeGerolamo were present in the vault on the Sunday evening of the robbery in order for the jury to convict the defendants of *conspiring* to commit mail fraud, wire fraud, and theft from an interstate shipment. *See United States v. Guillette*, 547 F.2d 743, 752 (2d Cir. 1976) (refusal to grant alibi instruction was harmless error because, among other reasons, "[t]he alibi, if believed by the jury, established no more than that appellants did not participate in one of numerous overt acts of the conspiracy"), *cert. denied*, 434 U.S. 839 (1977). Once a conspiracy is established, the liability of defendants extends to all acts of wrongdoing occurring during the course of and in furtherance of the conspiracy, such as the theft, mail fraud, and wire fraud. *See Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946). Given the interrelationship of these charges, then, the district court could have misled the jury by submitting the requested instruction. The jury might have erroneously concluded that a failure to prove presence in the vault on the night of the theft beyond a reasonable doubt required an acquittal on all charges. *Guillette*, 547 F.2d at 752. Therefore, we believe the district court did not err in refusing to grant the supplemental instruction.

IV. *SUFFICIENCY OF THE EVIDENCE*

Appellants Vincent and Gerald DeGerolamo also contend that the evidence was insufficient to support their convictions for conspiracy, mail fraud, and wire fraud.

However, "[t]he relevant question is not whether this court believes that the evidence at trial established guilt beyond a reasonable doubt. . . . Rather, an appellate court hearing a criminal case must uphold a conviction if *any* rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *United States v. Brown*, 937 F.2d 32, 35 (2d Cir.), *cert. denied*, 112 S. Ct. 323 (1991); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In this analysis, the evidence must be viewed "in the light most favorable to the government." *United States v. Stanley*, 928 F.2d 575, 576 (2d Cir.), *cert. denied*, 112 S. Ct. 141 (1991). To that end, a reviewing court "must credit every inference that could have been drawn in the government's favor." *United States v. Macklin*, 927 F.2d 1272, 1277 (2d Cir.), *cert. denied*, 112 S. Ct. 146 (1991) (*quoting United States v. Villegas*, 899 F.2d 1234, 1339 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983)).

In *United States v. Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), we explained that a conviction for violating the mail fraud statute will be sustained if there is sufficient evidence from which the jury could infer that "a scheme or artifice to defraud existed, that the participants in the scheme caused the mails to be used in furtherance of that scheme, and that the defendant was a participant in the fraudulent scheme." Appellants Vincent and Gerald DeGerolamo contend that the government failed to offer sufficient evidence on the third prong of this test—that they knew of any scheme to defraud or were willing participants in any scheme.

We believe there was ample evidence to support their convictions. As the government showed at trial, the three defendants carried out a carefully orchestrated plan that

involved: purchasing two armored car companies; defrauding customers into keeping their business with the new owners in part by mailing and faxing by wire certificates of insurance; defrauding insurers into providing coverage that would comfort nervous clients; filling the Hercules vault with massive amounts of cash; inquiring about when the FBI investigates losses from armored car companies; and carrying out the theft in a manner that would presumably avert an FBI inquiry and pin the blame on the prior owner and operator of the armored car businesses.

Given this evidence, a reasonable jury could conclude that the three defendants willingly participated in a scheme to defraud insurers and customers of Hercules which involved use of the mails and the wires. *See United States v. Davis*, 752 F.2d 963, 970 (5th Cir. 1985) (government need not establish that defendant participated in all aspects of a scheme to prove requisite participation for mail fraud conviction).

This same evidence of defendants' conduct from July 1989 through November 1989 provides a solid basis for inferring the existence of and participation in a conspiracy involving the three defendants. *See United States v. Young*, 745 F.2d 733, 762 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

V. *UPWARD DEPARTURE FOR FAILURE TO RETURN STOLEN MONEY*

Ronnie Bryser, Vincent DeGerolamo, and Gerald DeGerolamo contend that the district court's decision to depart upward five levels from the sentencing range provided by the Sentencing Guidelines for refusing to return

the $3.7 million stolen from the Hercules vault was erroneous.

A sentence is to be imposed within the applicable guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988 & Supp. 1991); *see also*, United States Sentencing Commission, *Guidelines Manual*, § 5K2.0, p.s. (Nov. 1991).

Here, the district court found that the "Sentencing Commission in preparing the guidelines did not give adequate consideration to the situation where defendants having taken money still have that money and obviously plan to have recourse to that money upon their release from prison." On this basis, the district court made a five-level upward enhancement of defendants' base offense levels.

We think the district court properly concluded that the Guidelines do not adequately consider situations such as this where defendants refuse to return stolen money because they are willing to exchange time in prison for instant riches upon release. In so concluding, we agree with the Eleventh Circuit's analysis of this issue. *See United States v. Valle*, 929 F.2d 629, 631 (11th Cir.) ("[T]he Guidelines do not contemplate a scenario such as this where the appellants expect to exploit the criminal justice system and enjoy the fruits of their crime following a relatively short period of incarceration."), *cert. denied*, 112 S. Ct. 401 (1991).

Appellants contend that the Sentencing Commission considered the issue of encouraging the return of stolen property by allowing a sentencing judge to order restitu-

tion. U.S.S.G. § 5E1.1. We agree with the district court's conclusion, however, that the Commission did not give adequate consideration to the issue of encouraging the return of stolen property *before* a defendant serves his or her time in prison.

We see little incentive in the Guidelines for defendants to return the $3.7 million prior to their supervised release. If defendants returned the money prior to sentencing, a judge might decide to lower a defendant's sentence *within the applicable Guidelines range*. We find no provision, though, which would provide a reduction *in the offense level* for returning the money following an adjudication of guilt. *See, e.g.* U.S.S.G. § 3E1.1 comment (acceptance of responsibility reduction available for "voluntary payment of restitution *prior* to adjudication of guilt") (emphasis added). Therefore, we believe the district court properly concluded that the Sentencing Commission did not give adequate consideration to the issue of encouraging defendants to return stolen money prior to their release from prison.

Appellants further contend that the district court's upward departure violated their Fifth Amendment rights by penalizing them for refusing to incriminate themselves by returning the stolen money prior to resolution of their appeal. We disagree. The act of producing the money would not be incriminating because it would not implicate the defendants in any crimes other than those for which they have been convicted. *See generally Doe v. United States*, 487 U.S. 201, 206-214 (1988) (discussing Fifth Amendment's applicability to acts of production and suggesting that act of production which does not involve testimonial or communicative evidence is not privileged). Although they argue that the admission of guilt inherent in their production of the money would undermine their

claim of innocence on appeal, production of the money would not be part of the appellate record and, accordingly, would be outside the scope of our review.

We note that this conclusion in no way undermines our holding in *United States v. Stratton*, 820 F.2d 562, 564-65 (2d Cir. 1987),[9] where we concluded that the enhancement of a sentence because the defendant refused to cooperate with the government by informing on other participants in a drug importation scheme was impermissible. In *Stratton*, it is possible that the defendant risked further incrimination by such cooperation. Defendants in the case at hand face no such potential adverse consequences from surrendering the stolen money. While we said that "[i]t is improper to increase a defendant's sentence due to his silence regardless of his motivations", *id.* at 565, we did so in the context of reference to cases involving failure to cooperate for fear of physical reprisal. Here, the "cooperation" involved is the return of stolen money. Thus we are in accord with the Eleventh Circuit, the only other court of appeals we know to have passed upon the propriety of such an upward departure, *United States v. Valle*, *supra*.

Ultimately, then, by allowing this upward departure for failure to return stolen money, we promote the purposes of "just punishment, respect for the law and adequate deterrence set forth in the Sentencing Reform Act." *United States v. Correa-Vargas*, 860 F.2d 35, 40 (2d Cir. 1988); *see also* 18 U.S.C. 3553(a)(2) (1988 & Supp. 1991). As the district court correctly explained:

> If any precedent was permitted to exist under which defendants could exchange a predictable time in

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9 Stratton is, we note, consistent with the decisions in other circuits. *See, e.g. United States v. Klotz*, 943 F.2d 707, 709-10 (7th Cir. 1991).

> prison for money, it would be an invitation to other people to commit crimes such as the one that these three defendants committed, to stash away the proceeds of the crime and then to have access to those proceeds once they leave prison.

We do not believe the jail cell should be a way station on the road to ill-gotten gains.

While we agree with the district court that, as a matter of law, an upward departure is permissible under the Guidelines and the relevant constitutional constraints, we do not believe that the district court made proper findings of fact on this disputed issue upon which to base the enhancement. *See Dunston v. United States*, 878 F.2d 648, 650 (2d Cir. 1989); Fed. R. Crim. P. 32(c)(3)(D).

During sentencing, Judge Broderick indicated that he "had not received any evidence that this money had been dissipated", and later indicated that "[defendants] obviously have this money stashed someplace where they at least expect it is beyond the reach of the Government or those who were deprived of the money." While we suspect that Judge Broderick is correct in thinking that defendants indeed have control over the money, appellants should have the opportunity to present evidence indicating otherwise.

Accordingly, we remand for resentencing before Judge Broderick so that appellants can contest the trial court's assumption that defendants still possess the money stolen from the vault.

VI. *CONCLUSION*

Having considered all of Vincent and Gerald DeGerolamo's arguments on these appeals with respect to their

convictions and having found in them no basis for reversal, we affirm. We do, however, believe that the district court erred by not making sufficient factual findings upon which to base an upward adjustment in defendants' sentences. Accordingly, we vacate the three defendants' sentences and remand for resentencing before Judge Broderick.